APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,336

UNITED STATES OF AMERICA,

v.

VULCANIZED RUBBER & PLASTICS COMPANY, *Appellant*

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued November 29, 1960

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges*.

Opinion of the Court

(Filed March 8, 1961)

By McLAUGHLIN, *Circuit Judge*.

This is an appeal from a summary judgment of the District Court for the Eastern District of Pennsylvania, awarding the United States civil penalties in the amount of $6,000 against Vulcanized Rubber & Plastics Company under Section 5(l) of the Federal Trade Commission Act as amended, 15 U.S.C.A. § 45(l), for violation of a cease and desist order issued by the Federal Trade Commission.

The facts are not in dispute. The defendant is a manufacturer of combs. Prior to 1950, defendant manufac-

tured all its combs by the sulphur vulcanizing method. Under this process rubber and sulphur are vulcanized under heat, resulting in a product recognized as "rubber" or "hard rubber" (hereafter both will be referred to as rubber). Until that time the defendant properly labeled its combs rubber. In 1950 defendant changed its manufacturing process to the injection mold type, which necessitated a change in the type of compound used to Kralastic D, a patented material made by the United States Rubber Company which was composed of approximately 13% nitrile rubber, 85% hardening resin and small percentages of stabilizer and color. Notwithstanding this change, the defendant continued to label its combs rubber. A complaint was instituted by the Federal Trade Commission and after extended hearings,[1] the following Cease and Desist Order was entered:

> "It is Ordered that respondent, Vulcanized Rubber & Plastics Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of any combs designed for use on human hair, to forthwith *cease and desist from representing, directly or by implication*, by any advertisement, packaging, labeling, branding, stamping, or other marking or indication *that such combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber.*" (Emphasis supplied).

A petition for review was then filed with the Court of Appeals for the District of Columbia. Prior to action thereon by that court, the defendant filed a compliance

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[1] The record of the hearings encompasses 3720 pages, together with approximately 200 exhibits.

report with the Commission stating that it would forthwith label its combs rubber-resin. The Commission rejected this. The defendant moved and was granted leave to amend its pending petition for review. This amendment informed the court of the Commission's interpretation and contended that it exceeded the bounds established by the complaint, findings and Order. In a per curiam opinion dismissing the petition for review, the court stated at 258 F.2d 685:

> "We do not understand the order *as written* to be challenged, but only the Commission's subsequent interpretation of its order. However, this interpretation may be changed or it may never be enforced. We hold that there is no controversy calling for judicial review of the interpretation at the present time."

Subsequently, the defendant filed another compliance report with the Commission, still asserting the right to label its combs rubber-resin. The Commission rejected this and instituted the present action for violation of the Order and recovery of civil penalties. The district court on cross motions for summary judgment found for the plaintiff and fixed the penalty at $6,000.[2] This appeal followed.

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[2] Since there was no issue of fact presented, the district court properly disposed of the case on summary judgment. We note, however, a prior case in the District Court for the District of New Jersey, United States v. Hindman, 179 F.Supp. 926 (D.N.J. 1960), where the court held an issue of fact was presented in the following circumstances. An action was brought to recover civil penalties under Section 5(*l*) of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45(*l*). Under the Commission's Order, the defendant was directed to "cease and desist from representing, directly or indirectly: * * * that the military clothing offered for sale or sold, or any of it is custom made * * *." Subsequently, the defendant changed his label to read "custom-tailored." The court held at p. 928: "A jury trial will occur on the limited issue as to whether or not the label term 'custom-tailored' on defendant's

The precise issue to be determined in this appeal is whether the defendant by labeling its combs rubber-resin violated the Commission's cease and desist Order. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 54 (1948).

Defendant's principal argument is that the labeling of its combs as being made of rubber-resin, does not fall within the scope of the Commission's Order. Necessarily defendant urges that the Order only prohibits it from labeling combs rubber, and that until there is a hearing by the Commission and a cease and desist order issued *specifically* prohibiting defendant from labeling its combs rubber-resin, an action for civil penalties cannot be maintained. We feel that the language of the order and the background of administrative hearings in this case completely refutes defendant's argument.

The Hearing Examiner found that the term rubber had a fixed and definite meaning. It was used to describe a distinct process whereby rubber and sulphur are vulcanized under heat. In the administrative proceeding, defendant contended that although the term rubber was recognized as being descriptive of those ingredients and that process, the term had acquired a secondary meaning broad enough to include defendant's product which did not contain sulphur, was not vulcanized and only contained a small percentage of nitrile rubber. The Hearing Examiner

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uniforms *means to their purchasers* that they are 'custom-made' ". (Emphasis supplied). The holding was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive. United States v. Piuma, 40 F.Supp. 119, 122-123 (S.D. Cal. 1941), aff'd. sub nom, Piuma v. United States, 126 F.2d 601 (9 Cir. 1942). Moreover, creating an issue of fact as the court did in Hindman, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public.

disallowed this argument, and in his findings, which were adopted by the Commission, stated:

> "The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as 'Hard Rubber' or 'Rubber' are false, misleading and deceptive. It is found that they are false, misleading and deceptive as these combs are not made or composed of rubber or hard rubber but are made or composed in large part of materials other than rubber or hard rubber and do not contain any sulphur and are not made by the vulcanization process but are admittedly made by the injection mold or extrusion process."

The final Order drafted in light of the entire record, was designed to eliminate defendant's labeling practice both presently and in the future. Additionally, the Order not only prohibited the specific direct representations that the combs were made of rubber, but also prohibited any representation which "*by implication*" so represented the product "*unless such combs are in fact made of vulcanized hard rubber.*"[3] (Emphasis supplied). The labeling of the

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[3] The scope of the Order prohibiting direct as well as implied representations that the combs were made of rubber, was warranted by the record and consonant with the legislative objects of the Federal Trade Commission Act.

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. *If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.*" (Emphasis supplied). Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473 (1951)

combs as being made of rubber resin falls within this latter proscription of the Order. United States v. Pinma, 40 F.Supp. 119 (S.D.Cal. 1941), aff'd sub nom. Pinma v. United States, 126 F.2d 601 (9 Cir. 1942); In re Whitney & Company, 273 F.2d 241 (9 Cir. 1959). It impliedly represents the combs to be made by a vulcanizing process which contains rubber and sulphur, when in fact the combs do not contain the ingredients nor are they produced by the process found by the Commission to be necessary to permit such labeling. Cf. Arrow Metal Products Corp. v. Federal Trade Com'n, 249 F.2d 83 (3 Cir. 1957); Masland Duraleather Co. v. Federal Trade Commission, 34 F.2d 733 (3 Cir. 1929).

In the Pinma case supra, the defendant was ordered to cease and desist from, among other things, representing *directly* or *indirectly* that his product was "a gland tonic" and that it was "the best gland remedy known." After a purported compliance by the defendant, the government instituted an action to recover civil penalties to which the defendant interposed the defense, inter alia, that he had changed certain language in the representation. The court made short shrift of the argument stating at p. 123:

> "The substitution of 'gland tablet' for 'gland tonic' or 'one of the best gland remedies known' for 'the best gland remedy known' does not materially change the nature of the representations."

In re Whitney & Company, supra, is another example of effective enforcement of a Commission cease and desist order. The Order prohibited Whitney from:

> "Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, upon purchases made for such buyer's own account."

The Order was affirmed by the Circuit Court of Appeals and that court directed compliance. Subsequently, Whitney sought to circumvent the Order by buying salmon for its own account at a price which contained a brokerage fee deduction and then reselling the salmon at a price which allowed as a discount, part of Whitney's brokerage fees. In holding this transaction was "an indirect grant of a discount in lieu of a commission or brokerage" and therefore violated the Order, the court stated at page 214:

> "The course followed by Whitney was a transparent attempt to circumvent the cease and desist order here in question. If persons subject to such orders were enabled to escape their effect by following such a course, these orders would be largely ineffective and unenforceable. *It was to preclude subterfuges of this kind that the orders here in question expressly forbade indirect as well as direct discounts in lieu of a commission or brokerage to persons buying for their own account.*" (Emphasis supplied).

Such is the situation in the case at bar. The defendant has attempted by a colorable compliance with the Commission's Order to frustrate its mandate. The substitution of the compound word "rubber-resin" for "rubber" on a product which is not produced with the ingredients and by the process held by the Commission to be the only recognized method to produce "rubber" is as much a violation of the Order as if defendant had continued to label its combs "rubber".

The judgment of the district court will be affirmed.

HASTIE, *Circuit Judge, dissenting.*

A restatement of the course of the administrative and judicial proceedings in this controversy is necessary to make clear the basis of my disagreement with the majority opinion.

Pursuant to an appropriate complaint, a hearing examiner of the Federal Trade Commission conducted a lengthy inquiry addressed to the question whether defendant Vulcanized Rubber & Plastics Co. was deceiving the public by labeling combs of its manufacture as "rubber" or "hard rubber" when the combs were in fact made of a patented compound containing 13% synthetic rubber, 85% resin and 2% coloring. The government's evidence indicated that the names "rubber" and "hard rubber" meant and connoted vulcanized hard rubber and nothing else. The compound used by defendant was described in its patent and in this proceeding as "rubber resin". Indeed, in the report of the hearing examiner, whose findings were adopted by the Commission, the designation "rubber resin" is used twice to describe the material of defendant's combs. There was not even an intimation in the record that such a designation was either inaccurate or deceptive. It was solely the use of the labels "rubber" and "hard rubber" which was challenged as misleading. Concluding that such designation would mislead the public, the Commission ordered the defendant to cease and desist "from representing, directly or by implication . . . that such combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are of fact made of vulcanized hard rubber".

In the light of the matter actually litigated and the recognition by the hearing examiner that defendant's combs were in fact "rubber resin", it is significant that in the Commission's order the words "rubber" and "hard rubber" are placed within quotation marks. This is an additional indication that the proceeding was solely concerned with and directed at the use of the designations "rubber" and "hard rubber".

Such being the circumstances and the apparent coverage of the Commission's cease and desist order, the defendant, after receiving the order, apprised the Commis-

sion that it was complying with its mandate by designating and describing its combs as "rubber-resin". The Commission replied that it rejected this report and considered the designation "rubber-resin" a violation of its order.

The defendant then sought a judicial ruling on this controversy by filing its petition to review the cease and desist order.[1] In issue were the scope and effect of the order and whether the restraint it imposed was warranted by the complaint and record before the Commission. After hearing, the court filed a per curiam decision dismissing the appeal. *Vulcanized Rubber & Plastics Co. v. Federal Trade Commission*, D.C. Cir. 1958, 258 F.2d 684. In so doing it distinguished the Commission's "interpretation" from the order "as written", stated that defendant's quarrel was with the former rather than the latter, and refused to adjudicate that controversy. Analytically, this unusual ruling must have been based upon an intermediate conclusion that the order "as written" did not make illegal the use of the designation "rubber resin" for the defendant's combs. For obviously, if it did, the petition challenged the order "as written".

Thereafter, the Commission brought the present action in the Eastern District of Pennsylvania for civil penalties and obtained a decision that defendant's use of "rubber resin" violates the very order which the District of Columbia Court of Appeals had examined and found not even to have been challenged in the controversy over the use of "rubber-resin".

Thus, the defendant is now in this position. It is held to have violated an order by using a label "rubber resin"

[1] The amended petition for review alleged that the Commission's cease and desist order is arbitrary and capricious in that it prohibits petitioner from representing that rubber sold and distributed by it [illegible] are "rubber resin," when such is the fact. Opposing that position, the Commission did not distort the alleged coverage of the order, but rather defended the prohibition of the designation "rubber resin" as proper.

—which under the ruling of the District of Columbia court was not forbidden by the order as written. Moreover, the defendant, which never had an opportunity before the Commission or on direct appeal from its order to have a hearing on the question whether the description "rubber-resin" suggests some vulcanized hard rubber content or is otherwise deceptive, cannot have that issue litigated now because this is a collateral proceeding in which merely the meaning of the order, rather than its justification on the administrative record, can be litigated.

Administrative and judicial processes should not combine to impose such a dilemma upon a party. I see no way to solve this problem fairly except to hold that the ruling of the court below was inconsistent with the decision of the Court of Appeals for the District of Columbia and, therefore, precluded by it. This would make it necessary for the Commission to challenge the defendant's use of "rubber-resin" as deceptive in a new administrative proceeding, thus affording the defendant for the first time an opportunity to contest that issue.

Accordingly, I would reverse the decision of the District Court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,336

UNITED STATES OF AMERICA

v.

VULCANIZED RUBBER & PLASTICS COMPANY, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: MCLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 8, 1961

Received & Filed

Mar 8 1961

IDA O. CRESKOFF
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13986

VULCANIZED RUBBER & PLASTICS COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review Order of the Federal Trade Commission

Decided May 29, 1958

Mr. Donald E. Van Kooghnet, with whom *Mr. H. Douglas Weaver* was on the brief, for petitioner.

Mr. E. K. Elkins, Attorney, Federal Trade Commission, with whom *Mr. James E. Corkey*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before EDGERTON, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

PER CURIAM: Petitioner seeks review of a Commission order to "cease and desist from representing . . . that [petitioner's] combs are 'rubber' or 'hard rubber' or are made of 'rubber' or 'hard rubber,' unless such combs are in fact made of vulcanized hard rubber." Over six months after the order had issued, the Commission undertook to construe its order, in a letter to petitioner, to prohibit representing the combs (which are 13% unvulcanized synthetic rubber and 85% plastic) as "rubber-resin." Petitioner contends that the order, as construed by the Commission, exceeds the bounds established by the

complaint and findings, citing *Gimbel Bros., Inc. v. Federal Trade Commission*, 116 F.2d 578 (2d Cir. 1941). We do not understand the order *as written* to be challenged, but only the Commission's subsequent interpretation of its order. However, this interpretation may be changed or it may never be enforced. We hold that there is no controversy calling for judicial review of the interpretation at the present time. See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

Dismissed.

STATUTES INVOLVED

Federal Trade Commission Act, 15 U.S.C. § 45

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corpoation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or if a petition for review has been filed within such

time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

REVIEW OF ORDER; REHEARING

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding

and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

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PENALTY FOR VIOLATION OF ORDER

(*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. * * *